85-1802

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

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DANIEL EASTON, KARL EASTON
and JACQUELINE EASTON,

Petitioners,

vs.

THE CITY OF BOULDER, COLORADO,
DAVID ALLEN and KEN SUNDBURG,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the court of appeals may affirm a trial court's Directed Verdict for the defendant in a 42 U.S.C. Section 1983 "False Imprisonment" case by finding that the defendants had probable cause as a matter of law, to arrest the plaintiff, even though the trial court did not rule upon the probable cause issue, and that issue was not appealed to, argued, or briefed before the court of appeals.

II. Whether a plaintiff in a 42 U.S.C. Section 1983 "False Imprisonment" case, who presents evidence that the manner in which the police conducted a criminal investigation was such that the reliability of the information secured is in doubt, and evidence that the police were aware of information which would indicate that their sole informants were of dubious reliability, presents a question as to the existence of probable cause as a matter of fact so as to preclude the court from finding probable cause as a matter of law on the police's Motion for Directed Verdict?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners, Daniel Easton, Karl Easton, and Jacqueline Easton, by their undersigned attorney, respectfully pray this Honorable Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 28, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, reported at 776 F.2d 1441, is reproduced in Appendix A.

The unpublished Order and Rulings of the United States District Court for the District of Colorado, dated June 29, 1983, is reproduced in Appendix B. The Order of the United States Court of Appeals for the Tenth Circuit denying Petition for Rehearing, and dated February 14, 1986 is reproduced in Appendix D.

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JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 28, 1985. A Petition for Rehearing in connection with said order was denied by the United States Court of Appeals for the Tenth Circuit on February 14, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the person or things to be seized.

UNITED STATES CODE, TITLE 42:

Section 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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STATEMENT OF THE CASE

In October of 1981, the parents of a Boulder, Colorado, boy contacted the police department to report that their son, three year-ten month old Michael, had been the victim of a nonviolent sexual assault. In response to this complaint, Patrol Officer Wands of the Boulder Police Department was dispatched to Michael's residence. Officer Wands made a report consisting primarily of the statements of young Michael and Michael's playmate, five year-nine month old Damian. Damian was a witness to the events which were the subject of the complaint.

No further action was taken on the complaint by the Boulder Police Department until approximately one week later when Officer Wands' report was assigned to Defendant Allen of the police department. Defendant Allen enlisted Defendant Sundburg to assist with the investigation of the complaint. Detective Allen and Sundburg's investigation consisted of a twenty minute interview with Michael, a twenty minute interview with Damian (transcriptions of these interviews were entered into evidence at trial), a review of Officer Wands' initial report, and a five to ten minute conversation with Daniel Easton (ROA S. Vol. I, p. 142). These defendants then prepared an arrest warrant affidavit, obtained an arrest warrant from a Boulder County Court Judge, and arrested Daniel Easton. Easton was incarcerated in the Boulder County Jail until he was released on bond the following afternoon. For a period of five weeks following the arrest, Daniel Easton was subject to bond restrictions. At the end of this period the Boulder County District Attorney's Office decided not to file formal charges and Easton was discharged from the bond obligations.

In May of 1982, Daniel Easton filed a complaint under 42 U.S.C. Section 1983 against the City of Boulder, Colorado, David Allen and Ken Sundburg in the United States District court for the District of Colorado alleging Fourth, Fifth and Fourteenth Amendment violations.[1]

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[1]Daniel Easton also alleged pendent state claims of false imprisonment and arrest, fraud, negligence misrespresentation, outrageous conduct, negligent investigation, and negligent training and supervision. The natural parents of Daniel Easton, Karl and Jacqueline Easton, asserted state claims of intentional or negligent infliction of emotional distress.

The jurisdiction of the district court was invoked under 28 U.S.C. Section 1343. Daniel Easton alleged that he had been unlawfully arrested and imprisoned by defendants Allen and Sundburg because *all* facts and information within the knowledge of the arresting detectives did not rise to the level of probable cause. Easton further alleged that his Constitutional rights had been violated because the arrest warrant affidavit that the defendants presented to the county court judge contained affirmative misrepresentations, omitted material facts which cast doubt upon the reliability of the officers' source of information, and improperly utilized "paraphrasing" so as to mislead the court issuing the warrant as to the actual facts uncovered during the course of the officers' investigation. Easton alleged Constitutional violations by the City of Boulder, Colorado, as a result of the failure of the city to implement its "arrest warrant review procedure", and because of a policy of the City of Boulder Police Department to exclude exculpatory information from arrest warrant affidavits.

Daniel Easton's claims were tried before a jury in June of 1983.[2] At the close of the plaintiff's evidence, the defendants moved, and the court granted a Directed Verdict as to all claims of Daniel Easton. The trial court ruled that the existence of the arrest warrant itself pro-

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[2]Prior to trial, the district court dismissed the claims of Karl and Jacqueline Easton, the court finding their allegations insufficient to state a cause of action. This dismissal was appealed to the court of appeals. However, the court of appeals did not rule on the merits of the parent's claim insomuch as it felt that the parent's claim was mooted by virtue of the court of appeals' opinion relative to Daniel Easton's claim. App. 21. Consequently, Karl and Jacqueline Easton are a party to this petition.

tected the defendants from liability as to both the federal and state claims (App. 29) and that the arrest warrant could be set aside, thus subjecting the defendants to potential liability, only upon a showing of intentional misrepresentations or a reckless disregard for the truth in connection with the affidavit for the arrest warrant. App. 10, 27. The court then ruled that the jury could not reasonably find intentional misrepresentations or a reckless disregard for the truth, and therefore the warrants established a complete defense to all claims. Although defendants' counsel urged the trial court to grant the Motion for a Directed Verdict upon the grounds that there was probable cause as a matter of law to arrest Daniel Easton (ROA Vol. VII, p. 6), the trial court did not address this issue in dismissing the claim. App. B.

The Eastons' appealed the dismissal of their claims to the Court of Appeals for the Tenth Circuit. On appeal, the Eastons urged, among other things, that the trial court erred by holding that a valid arrest warrant, in and of itself, constitutes a complete defense to a 42 U.S.C. Section 1983 claim for unlawful arrest. App. 11. While casting doubt on the rationale utilized by the district court in directing the verdict, the court of appeals nevertheless affirmed the result reached by the district court by finding that the evidence presented at trial would provide "no basis upon which a jury could have reasonably concluded that Detectives Allen and Sundberg did not have probable cause" to arrest Daniel Easton. App. 2, 15.

The issue upon which the court of appeals rested its decision (*i.e.*, existence of probable cause as a matter of law) was not addressed by the trial court in ruling on the

defendant's Motion for Direct Verdict. The issue was not raised *as an issue on appeal* by the parties in any of the appeal documents or in oral arguments before the court of appeals. The first mention of probable cause *as the dispositive issue* for affirming the trial court's decision appears in the court of appeals' opinion.

REASONS FOR GRANTING THE WRIT

I. The Impropriety Of The Court Of Appeals Determining The Probable Cause Issue For The First Time On Appeal.

A Writ of Certiorari should be granted in this matter to provide guidance to the lower courts as to when it is appropriate for appellate courts to exercise discretion in addressing issues which were not raised at the trial court level. The Writ should be granted because the court of appeals' decision is in conflict with the principles enunciated by this Court regarding exercise of discretion by appellate courts in addressing an issue (and resolving the appeal) which the parties did not have an opportunity to argue or brief on appeal. See *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Further, the exercise of discretion by the court of appeals in this case is in conflict with principles outlined by other circuit courts of appeals regarding circumstances in which it is appropriate to address issues not raised in the trial courts. See *N.H. Motor Transport v. Flynn,* 751 F.2d 43 (1st Cir., 1984); *Rebaldo v. Cuomo,* 749 F.2d 133 (2nd Cir., 1984); *Callejo v. Bancomer, S.A.,* 764 F.2d 1101 (5th Cir., 1985); *Marrese*

v. Interqual, Inc., 748 F.2d 373 (7th Cir., 1984); *Parker v. Corrothers*, 750 F.2d 653 (8th Cir., 1984); *United States v. Southern Fabricating Co., Inc.*, 764 F.2d 780 (11th Cir., 1985); *Reeder v. Kansas City Board of Police Commissions*, 733 F.2d 543 (8th Cir., 1984).

A. Appellate Courts Are In Need Of Direction From The Supreme Court As To When It Is Appropriate To Address Issues Not Raised In The Trial Court.

The district court's granting of the Motion for Directed Verdict was based upon that court's interpretation of the law regarding the effect of the issuance of an arrest warrant on the potential 42 U.S.C. Section 1983 liability of those who seek the warrant and arrest pursuant to the warrant's terms. App. B. The court of appeals below recognized that this was the issue on appeal when it stated:

> The extent to which, and under what circumstances, the facial validity of the warrant can be penetrated and the warrant set aside on the basis of the conduct of police officers before the magistrate issued the warrant, is the key issue of law in determining whether Easton has suffered a deprivation of his rights actionable under Section 1983 and the Constitution. App. at 14.

After the dismissal of this action by the trial court, and after the court of appeals' opinion below, the Supreme Court addressed this issue in *Malley v. Briggs*, 475 U.S. —, 89 L.Ed. 201, 271, 106 S.Ct. — (1986). It is apparent that, under this Court's holding in *Malley*, the rationale utilized by the district court in granting the Motion for a Directed Verdict was erroneous. The court of appeals, recognizing

that the Supreme Court would soon rule on the issue, avoided the issue presented on appeal by examining the entire record in the district court and determining that there was "no basis upon which a jury could have reasonably concluded that Detectives Allen and Sundberg did not have probable cause when they prepared the affidavit and obtained the warrant . . . ." App. at 15.

A fundamental distinction is recognized between probable cause as a factual issue for jury determination, and as a legal issue for determination by the court. While the factual issue of the existence of probable cause was certainly involved at the trial court level, it was not a legal issue that was addressed by the trial court. Further, despite the court of appeals' statements to the contrary, the "legal" issue was never presented as an issue on appeal by the parties in their appellate briefs or documents, or at oral arguments before the Tenth Circuit.[3]

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[3]The Order Denying the Petition for Rehearing of the court of appeals (App. D) speaking to this issue fails to distinguish between "probable cause as a matter of law" and "probable cause as a factual issue". As is discussed, infra, Easton has always taken a position that the existence vel non. of probable cause in this particular case presents a factual question for determination by the jury. The portions of Easton's appellate brief cited in Appendix D by the court of appeals (App. 40) did not constitute an argument that probable cause existed *as a matter of law*. Rather, the references to the "probable cause issue" in Easton's appellate briefs were in the context of Easton's argument that the *factual issue* of the existence of probable cause is determinative of whether or not Easton's constitutional rights were violated—and the existence of an arrest warrant did not, in and of itself, vitiate the Constitutional violation. *See Garris v. Rowland, infra.* Pages 17-19 of Easton's brief in the court of appeals are attached as Appendix E containing the full context of the cited quotation.

As to the propriety of the court of appeals considering an issue not passed on below, the Supreme Court stated in *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) that:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. At 121, 2877.

In expounding upon this general rule, the Supreme Court noted that a petitioner should "have the opportunity to present whatever legal arguments he may have . . ." at 121, 2877.

The *Singleton* court goes on to recognize that there may be exceptions to this general rule when it is appropriate for the appellate court to resolve an issue not passed on by the trial court. Whether or not the exception to the general rule would be invoked was left primarily to the discretion of the appellate court. Id. at 121. The *Singleton* decision provided little guidance to lower courts as to when that discretion should be exercised.

After *Singleton, supra,* the courts of appeals have, on numerous occasions utilized the general rule set forth in *Singleton,* to refuse to consider an issue which was not raised in the district court. See *Kromnick v. School District of Philadelphia,* 739 F.2d 894 (3rd Cir., 1984); *Smith v. Sorenson,* 748 F.2d 427 (8th Cir., 1984); *Channel v. Heckler,* 747 F.2d 577 (10th Cir., 1984); *Sanders v. United States,* 740 F.2d 886 (11th Cir., 1984). However, the courts of appeals have not hesitated to grasp the exception to the general rule as set out in *Singleton,* and decide an issue which had not been resolved by the trial court. When invoking the exception, the courts of appeals have

enumerated various reasons to justify determination of an issue not addressed at the trial court level.[4] Yet, there is very little interpretation of the law by the courts of appeals as to when it would *not* be appropriate to invoke the exception.

The Supreme Court has not directly addressed this issue since its pronouncements in *Singleton v. Wulff, supra.* This Court did however, recognize the continuing existence of the issue in footnote 4 of *United States v. Grace,* 461 U.S. 171, 103 S.Ct. 1705, 75 L.Ed.2d 736 (1983). Certiorari should be granted in this case in order to provide guidance to the courts of appeals as to when it is appropriate to exercise discretion in determining issues on appeal that were not considered by the trial court.

B. The Court Of Appeals' Decision Is In Conflict With Decisions Of This Court And Other Federal Courts Of Appeals As To When It Is Appropriate To Rule On An Issue Not Passed On Below.

In finding that it was inappropriate for the court of appeals in *Singleton v. Wulff, supra,* to address an issue not passed upon below, this Court relied upon the proposition that:

> [P]etitioner should have the opportunity to present whatever legal arguments he may have. . . . *Id.* at 121, 2877.

Easton did not have the opportunity to address the issue upon which the court of appeals based its decision—that probable cause to arrest existed *as a matter of law.*

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[4]Some of these cases are discussed in Section I.B., infra, of this petition.

While the existence of probable cause was contemplated as a factual issue at the trial level, the legal issue (of sufficiency of the evidence for the jury to find lack of probable cause) was not addressed, nor relied upon by the trial court in granting the defendant's motion for directed verdict. Respondents did not urge affirmance upon the grounds that probable cause existed as a matter of law, and therefore, that issue was never addressed or argued by the parties prior to the announcement of the court of appeals' opinion in October, 1985.

When courts of appeals from other circuits invoke the exception to the *Singleton* rule, the courts recognize that the parties must have an opportunity to brief and argue the issue upon which the appellate court is ruling. See *N.H. Motor Transport v. Flynn,* 751 F.2d 43 (1st Cir., 1984); *Rebaldo v. Cuomo,* 749 F.2d 133 (2nd Cir., 1984); *Callejo v. Bancomer, SA,* 764 F.2d 1101 (5th Cir., 1985); *Marrese v. Interqual, Inc.,* 748 F.2d 373 (7th Cir., 1984); *Parker v. Corrothers,* 750 F.2d 653 (8th Cir., 1984).

Further, the courts have recognized that the exception to the *Singleton* rule should be invoked only in cases where the issue upon which the court of appeals intends to rely is solely an issue of law. See *In Re: Howell,* 731 F.2d 624 (9th Cir., 1984); *United States v. Southern Fabricating Co., Inc.,* 764 F.2d 780 (11th Cir., 1985); *Rebaldo v. Cuomo, supra; Reeder v. Kansas City Board of Police Commissions,* 733 F.2d 543 (8th Cir., 1984). While "sufficiency of the evidence" issues may, in a technical sense, be considered legal issues which are subject to review, legal issues which require evaluation of factual evidence present the type of issues which are particularly inappro-

priate for decision in the first instance at the court of appeals. Certainly, a determination of the legal "sufficiency of evidence" by the court of appeals would be benefitted by affording the opportunity to the district court to address the question initially. See *Reeder v. Kansas City Board of Police Commissioners, supra.* The "unique opportunity afforded the trial judge to evaluate the credibility of the witnesses and to weigh the evidence is a consideration which points out the inappropriateness of considering a "sufficiency of the evidence" issue in the first instance on appeal. Cf. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed. 2d 606 (1982).

Deciding an issue requiring a determination as to the insufficiency of factual evidence for the first time on appeal, without benefit of the briefs or arguments of counsel it is in conflict with principles set out by this court and by courts of appeals in other circuits. A Writ of Certiorari should be granted to correct this conflict.

II. Evidence That Police Conducted A Criminal Investigation Such That The Reliability Of Information Secured In The Investigation Was Affected, And Existence Of Conflicting Evidence Of Reliability Presents Questions Of Fact Which Are For A Jury To Resolve.

A Writ of Certiorari should be granted in this matter because the court of appeals failed to properly apply the guidelines set out by this Court for determining the "reliability" of the source of the information upon which probable cause was founded. See *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Additionally, the opinion of the court of appeals departs from accepted

standards regarding evaluation of the factual evidence in connection with a Motion for Directed Verdict. *Palmer v. Ford Motor Co.*, 498 F.2d 952 (10th Cir., 1974); *J.E.K. Industries, Inc. v. Shoemaker*, 763 F.2d 348 (8th Cir., 1985); *Indian Coffee Corp. v. Proctor & Gamble*, 752 F.2d 891 (3rd Cir., 1985); *Flores v. Pierce*, 617 F.2d 1386 (9th Cir., 1980).

A. The Court Of Appeals Failed To Properly Apply The Guidelines Of This Court Set Down In Illinois v. Gates, In Ruling That The Defendants Had Probable Cause As A Matter Of Law To Arrest Daniel Easton.

Beck v. Ohio, 379 U.S. 89, 91 85 S.Ct. 223 (1964), held that the existence of probable cause turns on "the facts and circumstances within [the officers'] knowledge and of which they have *reasonably trustworthy information* . . . ." (emphasis provided). *Illinois v. Gates*, 462 U.S. 213 (1983) announced a "totality of the circumstances test" to be utilized when assessing the reliability of informant information in connection with the probable cause determination. This court recognized that the totality of the circumstances analysis, "permits a balanced assessment of the relative weights of *all* the various indicia of reliability (and unreliability) attending an informants' tip". Id. at 234. (emphasis provided).

If there is conflicting evidence as to the reliability of the information which forms the basis for the "probable cause" determination, that issue (probable cause) becomes a factual issue to be determined by the jury. *Garris v. Rowland*, 678 F.2d 1264, 1271 (5th Cir., 1982), *cert. denied*

sub nom. Ft. Worth v. Garris, 459 U.S. 864, 103 S.Ct. 143 (1982); *Creighton v. City of St. Paul,* 766 F.2d 1269 (8th Cir., 1985); see *Giordano v. Lee,* 434 F.2d 1227 (8th Cir., 1970), *cert. denied,* 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed.2d 709 (1971).

The thrust of Daniel Easton's claim that he was arrested without probable cause is directed at the reliability of the information used by the police in making the probable cause determination. Substantially *all* of the information which formed the basis for the probable cause determination had as its source the mouths and perceived conduct of a three year-ten month old child and a five year-nine month old child.[5] Easton presented expert testimony at trial to the effect that, in eliciting information from small children, great care must be taken to ensure that the information obtained is reliable—reliable in the sense that it accurately depicts what the children actually observed. Easton presented expert testimony on methods which should be utilized and avoided when attempting to elicit reliable and accurate information from small children. The evidence at trial indicated that the defendant police officers' investigation was totally insufficient to ensure reliability when contrasted to the expert testimony offered

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[5]All accounts of the alleged sexual assaults came to the police either by way of interviews with the children directly, or by way of the children's parents relating to the police what the children had indicated to them (the parents) (*i.e.,* Michael's father told Officer Wands what be *believed* Michael was stating to him). While the defendant police officers did determine independently that Daniel Easton resided in Apartment 218 (App. 5), this determination was inconsequential to the probable cause determination and did not corroborate the reliability of the children.

in this area.[6] At trial the plaintiff presented expert opinion that the setting, circumstances and interviews with the child witnesses were not adequate for the purpose of obtaining accurate information from the children. (ROA Vol. V, p. 134). "[I]t is proper for the jury to consider all the evidence, including questions regarding the sufficiency of the deputies' investigation at the scene in determining whether there was enough evidence to establish probable cause to arrest . . ." *Moore v. Market Place Restaurant, Inc.*, 754 F.2d 1336, 1347 (7th Cir., 1985). Probable cause is not governed by the fact that informants give information, but on the "sufficiency of the information in possession of the arresting officers and those that gave the command to arrest". *Id.* at 1345.

The evidence presented by Easton in the district court challenging the reliability of the source of the "probable cause" information did not rest solely upon allegations

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[6]By way of example, a child psychologist testified that young children are very "suggestible". It would therefore be necessary to interview the child's parents to determine prior conversations, actions or relationships which may have tainted the child's perception. To avoid suggestion, the interview should take place outside the presence of the parents. Further, leading questions should not be utilized and the interview should take place as close to the event as possible. (ROA Vol. V, pp. 125-134). The defendant police officers testified at trial that the interviews took place more than one week after the incident, they had no discussions with the children's parents as to their preparation of the children for the interview or as to the children's ability to perceive or relate facts (ROA Vol. V, p. 56); the interview took place with the parents present (ROA Ex. 3, 4) and; because the children could not tell the story by themselves, defendant Sundburg had to utilize primarily leading questions which were *very* suggestive of anticipated answers (ROA S. Vol. 1, p. 131).

of an insufficient investigation. Evidence was presented at trial that the defendant police officers became aware of affirmative information which would indicate that the children were not reliable sources of information. The opinion of the court of appeals below recognizes *some* of the evidence in this regard when it addresses the inconsistencies in the children's statements. App. 4, 17. These inconsistencies included a variance in the children's stories as to the color of "the man's" hair;[7] discrepancies as to whether one of the alleged sexual assaults in fact ever occured; and variances as to whether or not the child alleged to have been assaulted had been in Daniel Easton's apartment. Inconsistencies between an informant's story and the actual facts have been held by the Court of Appeals for the Eighth Circuit to establish a factual dispute about the truthfulness and the quality of the "facts" behind a probable cause determination so as to preclude granting of summary judgment. *Creighton v. City of St. Paul, supra.*

There was additional evidence at trial which indicated that the defendant police officers knew that the children were unreliable. The age of the children was but one factor which brings in question the reliability of the source. Defendant Allen acknowledged at trial that *because of the age of the children* he was unable to determine the time of the assault. (ROA S. Vol. I, pgs. 68, 69, 77, 78). Defendant Allen testified that at the interview of the

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[7]The hair discrepancy was particularly significant because it was the only physical characteristic of "the man" that the children were able to describe to the arresting officers. One child described "the man" as having white hair while the other child described "the man" as having brown hair.

three year old, his stepfather informed him that his comprehension of the past was not good. (ROA S. Vol. I, p. 73). A review of the transcripts of the interviews of the small children indicates great confusion on the part of the children and a general incapacity to relate facts known to them. This confusion in the children's responses to Detective Sundberg's questions is recognized in the court of appeals' opinion. App. 4.

The court of appeals' opinion seems to indicate that the reliability of information obtained from small children in sexual assault cases should be subject to less scrutiny because, "in a great many child molestation cases, the only available evidence that a crime has been committed is the testimony of the children". App. 15. Easton does not argue that information obtained from small children is unreliable per se. Rather, Easton contends that, in eliciting information from small children, great care must be taken to ensure that the information obtained is reliable—reliable in the sense that it accurately depicts what the child actually observed. Sufficient care was not taken by the defendants to ensure reliability in this case according to the testimony of Easton's experts. The information obtained from the children cannot be made reliable because it is the only information available. The Fourth Amendment rights of Daniel Easton cannot give way because it is difficult for the police to obtain evidence in a reliable manner.

The reasonableness of a probable cause determination is an issue for the jury. *Losch v. Borough of Parkesburg,* 736 F.2d 903, 909 (3rd Cir., 1984). Because of conflicting testimony as to the reliability of the source of in-

formation upon which probable cause was based, application of the *Illinois v. Gates, supra,* "totality of the circumstances test" mandates that a jury determine whether or not Daniel Easton was arrested upon probable cause.

B. The Court Of Appeals' Opinion Significantly Departs From Accepted Standards For Evaluating Evidence On A Motion For Directed Verdict.

It is a well-established principle of federal trial practice that a verdict may not be directed unless the evidence points all one way and is susceptible to no reasonable inference which may sustain the position of the party against whom the motion is made. All reasonable inferences from the facts must be decided in favor of Easton. *Palmer v. Ford Motor Co.,* 498 F.2d 952 (10th Cir., 1974); *J.E.K. Industries, Inc., v. Shoemaker,* 763 F.2d 348 (8th Cir., 1985); *Indian Coffee Corp. v. Procter & Gamble,* 752 F.2d 891 (3rd Cir., 1985); *Flores v. Pierce,* 617 F.2d 1386 (9th Cir., 1980).

The court of appeals' opinion below primarily discusses evidence which would support a finding of probable cause. Little is brought out in the opinion regarding the evidence elicited at trial which would detract from a finding of probable cause. The opinion below does recognize that there was evidence of inconsistencies in the stories given by the children informants. App. 4, 17. As is indicated above, there was additional evidence presented at trial which would support the plaintiff's position that the source of the information of the police officers was unreliable. Even the court of appeals' conclusion that arguments contained in Easton's appellate brief are "poorly supported by the record" (App. 17) is indicative of the fact

that a jury issue was presented. So long as there is some evidence in the record which would support the plaintiff's theory, a directed verdict was improper.

Further the indicia of probable cause upon which the court of appeals relies in its opinion was also subject to factual dispute. For example, the court's opinion refers several times to the children's identification of Apartment 218 as the apartment of the perpetrator. App. 3, 4. The court of appeals has accepted the defendant's version of the facts despite Easton's evidence that the children never made any such reliable identification. First, while it was clear that the children attempted to physically *point* out an apartment at the request of the adults, it was never *conclusively* established that the apartment they were attempting to identify was number 218. The child never said the number "218" he just pointed off in the direction of several apartments that looked the same from the outside. (ROA Vol. V, p. 4, 55). Further, it was never clearly established at trial that the apartment being identified was the apartment of *the perpetrator.* These were nothing but conclusions on the adult's part as to what *they believed* the child to be stating. At a minimum, a jury should have been permitted to judge for itself.

Similarly, the court of appeals addresses the allegation of Daniel Easton that the interviews of the small children were not conducted by someone with expertise in obtaining the information from the children. The court of appeals pointed to the fact that Defendant Sundburg testified as to interviewing 50-60 children and attended an institute which included a segment on investigation of child abuse. App. 16. The opinion does *not* reflect that when asked directly as to whether he attended any specific

classes on proper methods of interviewing very small children, Defendant Sundberg answered he "probably had" in "a round about way". (ROA S. Vol. I, p. 148). Defendant Sundburg later confirmed that he never attended any such classes. (ROA Vol. V, p. 5). Plaintiff's expert child psychologist testified at trial that a review of the transcript of Defendant Sundburg's interviews with the children indicated that the officers "weren't quite aware of the abilities of a youngster of three years of age to respond in an interview" (ROA Vol. V, p. 134). Surely, this conflicting evidence as to Defendant Sundburg's expertise was for a jury to consider and should have been resolved in favor of Easton when ruling on a Directed Verdict Motion.

This Court should issue a writ of certiorari because the court of appeals has significanty departed from accepted standards to be followed when evaluating factual evidence on a Motion for Directed Verdict.

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CONCLUSION

Because the court of appeals' decision in this matter (1) is in conflict with principles enunciated by this Court and other circuit courts of appeals regarding the circumstances under which an appellate court may decide an issue not addressed by the trial court, (2) incorrectly applies the guidelines set out by this Court for assessing the reliability of informant information in a probable cause determination, and (3) departs from well established standards for evaluating factual evidence on a Motion for Directed Verdict, this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1970

DANIEL EASTON, KARL EASTON and JACQUALINE EASTON,

Plaintiffs/Appellants,

vs.

THE CITY OF BOULDER, COLORADO, DAVID ALLEN, individually and as police officer, Boulder, Colorado, KEN SUNDBERG, individually and as police officer, Boulder, Colorado,

Defendants/Appellees.

Appeal from the United States District Court
For the District of Colorado
(D.C. Civil Action No. 82-M-706)

(Filed October 28, 1985)

David S. Williamson of Newport, Rhode Island, (Bruce P. Shaffer, Boulder, Colorado, with him on the brief) for plaintiffs/appellants.

Thomas L. Kanan (Theodore S. Halaby and Leslie L. Schluter with him on the brief) of Halaby & McCrea, Denver, Colorado, for defendants/appellees.

Before LOGAN and McWILLIAMS, Circuit Judges, and BOHANON, Senior District Judge.*

BOHANON, District Judge

This appeal is taken by Karl Easton and Jacqualine Easton from the trial court's dismissal before trial of

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* Honorable Luther Bohanon, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

their claims of negligent and intentional infliction of emotional distress. Daniel Easton also appeals the Directed Verdict granted against him by the trial court at the conclusion of the plaintiffs' presentation of evidence at trial. All of appellants' claims stem from the alleged wrongful arrest of Daniel Easton by the individual appellant police officers in 1981. We find that the rationale given by the district court for its decision to direct the verdict against Daniel Easton was suspect, given the current state of the law, but we must on the record before us affirm the result reached. We also affirm the trial court's dismissal of the claims of Karl and Jacqualine Easton.

Facts

On October 19, 1981, the parents of a Boulder, Colorado boy contacted the Boulder Police Department to report that their son Michael had been sexually molested on the previous day. Police Officer Robert Wands responded to the complaint and interviewed Michael's stepfather, Michael (also known as "Mikey"), a five year old playmate of Michael named Damian who had witnessed one of two sexual assaults described by Michael, and Damian's mother. Officer Wands' report states that Michael was four years old; however, it also gives Michael's birthday, December 10, 1977, revealing that Michael actually lacked some two months being four.

Officer Wands' report indicates that Michael's stepfather became aware of the incidents in question while preparing Michael for bed on October 18, 1981. Michael was talking about events of the day and related to his father that he had met a man in the apartment complex where he and his parents resided and had gone to the

man's apartment where a non-violent sexual assault occurred. Later that afternoon the same man approached Michael and Damian as they were playing on the west side of the apartment complex. At his suggestion the boys followed the man to a laundry room in a nearby apartment complex where the man made a tent out of an old blanket. The man crawled under the tent and had the boys join him, then sexually assaulted Michael again. When Michael's father asked Michael to show him the apartment where the man took Michael, he pointed to apartment No. 218.

When interviewed personally by Officer Wands, Michael's own statements confirmed, with added detail, all the facts related by his father. Wands' separate interview of Damian also corroborated all the facts given by Michael and by his father with respect to the assault Damian witnessed. When asked by Officer Wands to accompany him and show him the man's apartment, Michael again pointed to No. 218. Damian also indicated that apartment No. 218 was the man's residence. Damian and Michael together led Wands to the laundry room where the second assault took place. There Wands found a blanket, which both boys identified as the one the man had used to make a tent, and a black vinyl chair. Upon checking the manager's records on apartment No. 218, Wands found it to be inhabited by Daniel Easton, one of the plaintiffs in the instant action. Wands questioned the apartment manager, obtained a physical description of Easton, and learned that Easton had lived at the complex for four years and was quiet and a loner with few if any friends visiting him at the apartment complex. Wands' report also noted that Easton had "been observed in the past

staring at the children playing in the common area of the apartment complex."

After Officer Wands concluded his investigation, there was no further police action in the case until October 26, 1981, when the case was assigned to the defendant appellee Detective David Allen of the Crimes Against Persons Bureau. Detective Allen had had little experience with juveniles and after reviewing Wands' report he decided to wait until the following day, when the defendant appellee Detective Kenneth Sundberg, a juvenile detective, was available to assist in interviewing the children.

Michael was interviewed, in the presence of his stepfather, in their apartment on the morning of October 27. Most of the interview was recorded, and subsequently transcribed. The questions were asked by Detective Sundberg. Michael's responses to Detective Sundberg's questions were somewhat confused and differed in some particulars from the account reported earlier by Officer Wands. The transcript appears to indicate that by the time of the later interview Michael recalled only one encounter with the man, that being the occurrence involving the blanket tent in the laundry room when Michael and the man were accompanied by Damian. This time Michael denied that he had been in the man's "house" (apartment) and also denied that he had previously said he had been in the "house." He did, however, again indicate by pointing that apartment No. 218 was the man's residence. His description of the events in the laundry room was still consistent with the account reported by Wands. Michael described the man as having brown col-

lar length hair, which was consistent with the description of Easton given to Wands by the apartment manager.

At the end of the interview, after the tape recorder was turned off, Michael was sitting on his stepfather's lap when the stepfather noticed a man coming out of his apartment across the complex and asked Michael "Is that the man?" According to Detective Sundberg's testimony at trial "[a]t that point, his son slunk down into his chest and said an audible 'Yes,' and then tucked his head into his father's chest." Detective Sundberg indicated that the way Michael shyed away from Easton when making the identification convinced Sundberg that Michael was not at all confused and that a positive identification had been made.

Subsequently, the detectives approached the man identified by Michael and, without advising him of the nature of their investigation or placing him under arest, obtained identification establishing that he was Daniel Easton. The detectives then visited the managing office of the apartment complex and obtained a copy of the rental agreement for apartment 218 which corroborated Officer Wands' earlier report that Daniel Easton was the only resident.

Later that same day, Detective Sundberg returned to the apartment complex to interview Damian. The five year old's description of the sexual assault in the laundry room was consistent with all previous accounts. In this interview, however, Damian related that after the laundry room incident the man took the boys to his apartment and showed them around. Damian denied that there was any sexual assault at that time. He confirmed that the apart-

ment he had previously shown Officer Wands was the one where the man who assaulted Michael lived. Damian's physical description of the man was at variance with Michael's in that he said the man's hair color matched his own, which is light brown to blond, and was not like the dark brown hair of another individual who was present at the time of Damian's interview.[1] Daniel Easton has dark brown hair.

In the late afternoon of the day when Michael and Damian were interviewed, Detective Allen, with Detective Sundberg's assistance, drafted an affidavit for a warrant to arrest Daniel Easton for commission of the crime of sexual assault on a child. Because of this document's im-

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[1] The transcript of the portion of the interview relating to the suspect's hair color can be read to indicate that Damian was somewhat confused on this matter:

Sundberg: Do you know what he looks like? Can you tell me what he looks like? Why don't you?

Damian: He was kind of hair, he has the color of my hair and he's like a Bruce . . .

Sundberg: What's color is his hair?

Damian: What?

[Damian's mother]: Dark like Bruce's?

Damian: No, like mine.

[Damian's mother]: Are you sure?

Damian: White.

At trial Detective Sundberg stated that he did not find Damian's statements to be a discrepancy because subsequent investigations revealed that Easton had worn a white wig on some occasions when presenting puppet shows to children in the apartment coxplex. However, this last information does not appear to have been known by the police prior to Easton's arrest and so will not be considered by us in relation to the matter of probable cause discussed *infra*.

portance to our discussion in this case, the affidavit's statement of facts establishing grounds for issuance of an arrest warrant are quoted at length in the margin.[2]

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[2] The Affiant, Detective Dave Allen, is a duly commissioned member of the Boulder Police Department in the City of Boulder, County of Boulder, State of Colorado.

On October 19, 1981, Officer Bob Wands of the Boulder Police Department responded to the address of 1024 Adams Circle, #216, Boulder, Colorado, reference to a complaint on a sexual assault on a child. A police report was taken, CR#81-11313. The details surrounding the sexual assault were recorded in the police report. Affiant personally read this report.

The report stated that Officer Wands met with the Complainant, [name deleted], (date of birth 3/25/55) who stated he is the stepfather to the victim, Michael [name deleted], age 4. [The stepfather] stated that as he was preparing Michael for bed on the night of October 18, 1981, his son began talking of an incident that took place during the day. The contents of that conversation were told to Officer Wands by the Complainant.

The Affiant and Detective Ken Sundberg of the Boulder Police Department, personally talked with the Complainant and the Victim on the date of October 27, 1981.

The Victim, Michael [name deleted], stated personally to the Affiant that he and a friend, Damian, (who was identified by Officer as Damian [name deleted], age 5, address of 1024 Adams Circle, #126, Boulder, Colorado) were playing together on October 18, 1981, at approximately 1100 hours.

The Victim stated to the Affiant that he and Damian were invited by a "man" to come into the laundry room, which is located at the same apartment building, 1024 Adams Circle. Once the boys had entered the laundry room, the "man" who had draped a blanket over some chairs, forming a tent, crawled under the blanket. The "man" once under the blanket took his own outer pants off, exposing his genitals and had the two victims crawl under the blanket with him. The Victim stated to Affiant that once under the blanket, the "man" pulled Michael's pants down and touched the boy's genitals.

(Continued on following page)

It should be noted that the affidavit does not give all the information known to the police at the time it was prepared. Among other items not mentioned were Michael's initial account of a sexual assault in the man's apartment, Michael's repeated identification of apartment No. 218 as belonging to the man and the fact that the apartment manager's records showed Easton rented that apartment. The affidavit also makes no reference to Damian's account of the events in question.

When the affidavit was completed, it was reviewed by Detective Allen's supervisor, Sergeant Hendry, and then by attorney Robert Keatley, the police legal advisor.

(Continued from previous page)

During the interview by the Affiant and Detective Sundberg, it was learned that the Victim, Michael, referred to his penis as "pee wee". The Victim referred to "pee wee" several times during the interview. Detective Sundberg asked the Victim to point on his own body where his pee wee was and Michael pointed to the area just below the waist between his legs.

During a portion of the interview, the Victim was sitting on his father's lap looking towards the picture window in the living room, when a male subject walked out of a neighboring apartment. The Victim, Michael, stated that the subject was the same "man" who had touched him on the day in question.

The Affiant and Detective Sundberg, upon hearing this identification, left the victim's apartment and contacted the subject.

The "man" identified himself to the Affiant as Daniel Easton, date of birth 10/13/57, address of 1024 Adams Circle, #218, Boulder, Colorado. The Affiant observed that the subject was a white male, height 5'5", 115#, brown hair and brown eyes.

Based on the details of the incident, and the identification by Victim, Michael [name deleted], the Affiant hereby requests an Arrest Warrant be issued for subject, Danial Easton, date of birth 10/13/57, charging him with Sexual Assault on a Child, 18-3-405, 1973, C.R.S. as amended.

By then it was after 5:00 p.m. on a Friday evening and the detectives had to take the affidavit to the home of Boulder County Court Judge David Torke to get the warrant issued. Judge Torke took Detective Allen's oath on the affidavit and then, based solely on the facts stated therein, signed the warrant for David Easton's arrest. Detectives Allen and Sundberg arrested Easton at approximately 7:00 p.m. at the Colorado University School of Music, where he was a student. Easton spent the night in the Boulder County jail before being released on bail the following afternoon at his first court appearance. Easton's parents, Karl and Jacqualine Easton, the other two plaintiff/appellants in this matter, attended this court appearance and Daniel lived with them in New York City, subject to bond restrictions, for the following five weeks. At the end of that period, the Boulder District Attorney's Office decided not to file formal charges, and Easton was discharged from his bond obligations.

Thereafter, on May 5, 1982, appellants brought this suit against the City of Boulder, Colorado, and Officers Allen, Sundberg and Wands, both individually and in their capacities as police officers. Appellants claimed the actions of the police officers and the failure of the City to train officers properly resulted in a denial of Daniel Easton's civil rights granted under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The complaint purported to state claims for relief under 42 U.S.C. §§ 1981, 1983 and 1988. The Eastons also attempted to assert several tort claims under state law, including claims by Karl and Jacqualine Easton for intentional infliction of emotional distress, outrageous conduct, and negligent infliction of emotional distress.

Prior to trial, the parties stipulated to the dismissal of Officer Wands from the suit, and the trial court, on defendants' motion, dismissed Karl and Jacqualine Easton as plaintiffs, finding their allegations to be insufficient as a matter of law to state a claim for relief. Also before trial, the judge ordered that the trial be bifurcated as to issues of liability and of damages. Trial to a jury commenced on June 27, 1984.

After the presentation of Daniel Easton's case, the trial judge granted defendants' motion for a directed verdict. In making his oral ruling on this motion, the trial judge had the following comments on the basis for his decision regarding the validity of the warrant for Easton's arrest:

> My view of the law is that a warrant can be challenged and set aside in a civil action such as this upon a showing that the police officer obtaining the warrant obtained it through intentional misrepresentation; that is to say, knowing that the affidavit was false. . . . Or it can be set aside upon a showing that the police officer making the affidavit did so with a reckless disregard for the truth . . .
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> . . .
>
> . . . it is my position on the law that a negligent misrepresentation does not void a warrant.

The court found that, viewing the evidence and the inferences therefrom most favorably to the plaintiff Easton, no jury could reasonably find intentional misrepresentation or reckless disregard for the truth in the obtaining of the subject warrant based on the evidence presented in plaintiff's case. He further concluded that if Easton was arrested on a valid warrant there could have been no violation of Easton's constitutional rights giving rise to a cause

of action under 42 U.S.C. § 1983. The judge also found the defendants to be protected by the warrant from Easton's state law tort claims and, further, that the defendant officers' affirmative defenses of qualified immunity were established.

On appeal, the Eastons raised the following contentions: 1) it was error for the trial court to bifurcate the trial as to the issues of liability and damages; 2) the existence of a valid arrest warrant does not, in and of itself, constitute a complete defense to a 42 U.S.C. § 1983 claim for unlawful arrest; 3) negligent misrepresentation by police officers in obtaining an arrest warrant is sufficient to invalidate the warrant; 4) the evidence at trial was, in any event, sufficient to allow a jury to conclude that the defendant officers made intentional misrepresentations or acted with a reckless disregard for the truth in obtaining the arrest warrant; 5) Colorado law recognizes a cause of action against police officers who negligently conduct criminal investigations; 6) Colorado law also recognizes a cause of action against police officers who negligently misrepresent facts in obtaining an arrest warrant; 7) the City of Boulder is liable for negligently training or supervising the defendant officers in the areas of arrest warrant procedures and investigation of crimes involving small children; 8) the trial court erred in dismissing the claims of Karl and Jacqualine Easton for intentional or negligent infliction of emotional distress.

The Trial Court's Decision to Bifurcate

Easton first asserts that he was prejudiced by the trial court's decision to bifurcate the trial as to liability and damages because damages are an essential element of the torts of negligence and culpable recklessness (gross negli-

gence) and must be considered in determining whether a particular risk was unreasonable. *United States v. Carroll Towing Company,* 159 F.2d 169, 173 (2nd Cir. 1947); *Sagar v. City of Woodland Park,* 543 F.Supp. 282 (D.C. Colo. 1982). The Federal Rules of Civil Procedure give district courts broad discretion in deciding whether to sever issues for trial and the exercise of that discretion will be set aside only if clearly abused. F.R.CIV.P 42(b); *Parmer v. National Cash Register Company,* 503 F.2d 275, 277 (6th Cir. 1974); *Idzojtic v. Pennsylvania Railroad Company,* 456 F.2d 1228, 1230 (3rd Cir. 1972); 9 Wright & Miller, *Federal Practice and Procedure* § 2392 (1971). The theory advanced by Easton, if accepted, would have the result of forbidding bifurcation whenever the plaintiff's claim is based on negligence—a consequence certainly at odds with common practice. *See,* e.g. *Idzojtic,* 456 F.2d at 1230. We need not decide this issue today, however, since we determine *infra* that the question of whether there was probable cause for the issuance of the warrant to arrest Michael Easton is dispositive of the appellants' claims. Because any evidence of Easton's damages is irrelevant to the determination of probable cause, he has suffered no prejudice, and any error by the trial court in this regard is harmless.

The Directed Verdict

Section 1983[3] does not by itself impose any state of mind requirement on those to be held liable under its pro-

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[3] 42 U.S.C. § 1983 (1982) provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

visions. *Parratt v. Taylor,* 451 U.S. 527 (1981); *Hewitt v. City of Truth or Consequences,* 758 F.2d 1375, 1378 (10th Cir. 1985) ("negligent conduct may under appropriate circumstances give rise to a constitutional deprivation remediable under section 1983"); *McKay v. Hammock,* 730 F.2d 1367 (10th Cir. 1984) (en banc). For any such requirement to be applicable in a particular case, it must be necessitated by the character of the alleged violation of the Constitution or laws of the United States upon which § 1983 liability is to be predicated.

In this case on appeal Daniel Easton does not seriously argue that any of his constitutional rights are in issue, other than those granted by the Fourth Amendment and made applicable to the states by the Fourteenth. The relevant portions of the Fourth Amendment provide that:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons . . . to be seized.

Easton was arrested upon a warrant and does not before us challenge the facial validity of that warrant. The extent to which, and under what circumstances, the facial validity of the warrant can be penetrated and the warrant set aside on the basis of the conduct of police officers before the magistrate issued the warrant, is the key issue of law in determining whether Easton has suffered a deprivation of his rights actionable under § 1983 and the Constitution.

The circuit courts that have considered the question of whether a § 1983 suit based upon a claim of unlawful

arrest can be sustained where the arrest was pursuant to a warrant, are not in agreement, and at times even different panels within the same circuit appear to have been in unknowing conflict on the issue. The Fifth Circuit in 1982 held, in a § 1983 suit alleging malice on the part of an arresting officer, that "where an arrest is made under authority of a properly issued warrant, the arrest is simply not a false arrest. . . . Such an arrest is not unconstitutional, and a complaint based on such arrest is subject to dismissal for failure to state a claim." *Smith v. Gonzales,* 670 F.2d 522, 526 *cert. denied* 459 U.S. 1005 (1982) (citations omitted). This holding has never been overruled and was followed by the same court as recently as 1984. *Wheeler v. Cosden Oil and Chemical Co.,* 744 F.2d 1131 (1984). Nonetheless, in an opinion filed less than a month after *Wheeler,* the same circuit ruled that in a § 1983 suit for unlawful arrest, evidence of intentional or reckless misrepresentations made by police officer defendants in obtaining a warrant, if believed by the jury, would invalidate the warrant and expose the officers to liability. *Hindman v. City of Paris, Texas,* 746 F.2d 1063 (1984). This latter position is more in line with that of several other circuits. *Smiddy v. Varney,* 665 F.2d 261 (9th Cir. 1981) *cert. denied,* 459 U.S. 829 (1982); *Ames v. United States,* 600 F.2d 183 (8th Cir. 1979); *Dellums v. Powell,* 184 U.S. App. D.C. 275, 566 F.2d 167 (1977) *cert. denied* 438 U.S. 916 (1978); *See Gonzales,* 459 U.S. at 1006 (White J. dissenting from denial of certiorari). The First Circuit has gone even further, holding that "where an officer is 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause," § 1983 liability will attach. *Briggs*

v. Malley, 748 F.2d 715, 721 (1984) *cert. granted* — U.S. —, 105 S.Ct. 2554, 86 L.Ed.2d 271 (May 28, 1985)[4]

Since the Supreme Court has granted certiorari in *Briggs,* a definitive resolution of the matter is likely to be forthcoming. Without expressing an opinion on the disputed question ourselves, at this time, we note only that even giving Easton the benefit of the most lenient position reasonably possible, the Constitution requires no more of officers seeking a warrant (or for that matter, making a warrantless arrest) than probable cause. Having examined the record of the evidence presented in the trial of this case in great detail, we can find no basis upon which a jury could have reasonably concluded that Detectives Allen and Sundberg did not have probable cause when they prepared the affidavit and obtained the warrant from Magistrate Torke and when they arrested Easton.

On appeal, Easton's challenge to the validity of the warrant is primarily directed toward challenging the reliability of the child testimony used by the police. Easton seems to suggest that because Damian was only 5 years and 9 months old and Michael only 3 years and 10 months old, their testimony was somehow suspect to begin with. This is an entirely unacceptable point of view. In a great many child molestation cases, the only available evidence that a crime has been committed is the testimony of chil-

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[4] The Fifth Circuit opinion in *Hindman* also noted that an officer's subjective good faith has been irrelevant since the Supreme Court's decision in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The *Hindman* court did not, however, comment on the apparent inconsistency, under traditional tort concepts, in permitting warrants to be invalidated for intentional or reckless misrepresentations but not for negligence when subjective good faith is not a permissible consideration.

dren. To discount such testimony from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution.

Easton also charges that "[t]he children were not interviewed by anyone with expertise in obtaining information from children." (App. brief at 27) To the contrary, Officer Sundberg at trial testified that he had interviewed 50 to 60 children over the past 3½ years as a juvenile detective and had attended an institute in Minnesota on juvenile police work which included a segment on the investigation of child abuse. Furthermore, it would, as the trial court noted, place an intolerable burden on many smaller communities and law enforcement agencies to require police to use only juvenile experts to interview children in connection with child abuse cases.

Again, Easton claims that "[t]he individual Defendants made absolutely no attempts to corroborate independently the statements of these children. The Defendants took no steps whatsoever to determine the reliability of the children with respect to the identification." *id.* We find it extremely difficult to imagine even that these charges are presented to us in good faith. The record plainly shows that Detectives Allen and Sundberg corroborated the children's statements about where the suspect lived and Michael's visual identification in two ways; 1) by checking the apartment complex records which established that Easton was the only resident of apartment 218, and 2) by contacting Easton directly based on Michael's identification and obtaining identification which showed his name and address. The officers also had Officer Wands' report which corroborated the children's interview state-

ments to the detectives about the laundry room incident and described Wands' own corroboration of the children's story by having them lead him to the laundry room where he found the blanket and chair they had mentioned.

Easton's appellate brief contains other statements which similarly are either poorly supported by the record or flatly contradicted by it, but we do not find it necessary or desirable to comment on each one. We turn instead to the one point which does lend some merit to the appellants' case, if not conclusively so, that being the existence of apparent inconsistencies in the children's statements.

It is a fact that Michael's statements concerning the occurrence of a sexual assault in Easton's apartment before the laundry room incident are self-contradictory. It is also true that Michael's later statement that he had never been in Easton's apartment was contradicted by Damian's description of the visit there after the laundry room assault. Damian's comments about the man's hair color are inconsistent with Michael's. There are other minor discrepancies, but these are the only ones we find significant upon the record.

We begin by noting that when examining informant evidence used to support a claim of probable cause for a warrant, or a warrantless arrest, the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness.

> Courts are much more concerned with veracity when the source of the information is an informant from

> the criminal milieu rather than an average citizen who has found himself in the position of a crime victim or witness. As noted by Justice Harlan in United States v. Harris [403 U.S. 573, 579 (1971) (dissenting opinion)], "the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis." Basis of knowledge is likewise less of a problem in the victim-witness cases, for by definition the victim or witness is reporting first-hand knowledge.

1 W.R. LaFave, *Search and Seizure,* 586-587 (1978); *cf. Jaben v. United States,* 381 U.S. 214, 224 (1965). This relaxed standard is consistent with the common sense approach taken by the Supreme Court in defining probable cause. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States,* 338 U.S. 160, 175 (1949) quoted in *Illinois v. Gates,* 462 U.S. 213, 231 (1983).

The standard of probable cause does not require indubitable or necessarily convincing evidence, but only so much "reasonably trustworthy information" as "to warrant a prudent man in believing that the [arrestee has] committed or [is] committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91 (1964).

> While a warrant may issue only upon a finding of "probable cause," this Court has long held that "the term 'probable cause' . . . means less than evidence which would justify condemnation." *Locke v. United States,* 7 Cranch 339, 348, and that a finding of "probable cause" may rest upon evidence which

> is not legally competent in a criminal trial. *Draper v. United States,* 358 U.S. 307, 311.

United States v. Ventresca, 380 U.S. 102, 107 (1965).

Thus even if the testimony of Michael and Damian was inadmissible in court, perhaps because of an inability to understand the oath, or for whatever reason, their statements could nonetheless be used as a basis for a probable cause determination to support the issuance of a warrant. The existence of inconsistencies in their statements does not change this principle of law in the least. Even with respect to evidence admitted during a trial, we have noted that "[e]vidence is not necessarily insufficient merely because the witness' testimony has been contradictory and the explanations therefor difficult of belief." *United States v. Jackson,* 579 F.2d 553, 558 (10th Cir.) *cert. denied sub nom Allen v. United States,* 439 U.S. 981 (1978). *See also United States v. Tropiano,* 418 F.2d 1069, 1074 (2nd Cir. 1969) ("a witness may be inaccurate, contradictory and even untruthful in some respects and yet be entirely credible in the essentials of his testimony.") *cert. denied* 397 U.S. 1021 (1970); *In Re A.H.B.,* 491 A.2d 490, 495 (D.C. App. 1985) ("A certain amount of inconsistency in the evidence is almost inevitable in any trial, but it rarely justifies reversal.") We would indeed be amiss if we were to hold police officers and magistrates to a stricter standard when evaluating evidence for a probable cause determination.

Here the inconsistencies pressed by Easton do nothing to undermine the solid core of the children's statements regarding the laundry room assault and the location of the perpetrator's apartment. Nor do they detract from the

detectives' impression, based on personal observation of Michael's demeanor and behavior, that his statements were spontaneous and revealed knowledge of things that a child his age could not possibly possess had an event of the kind described not occurred. The children's descriptions of the laundry room assault and Michael's visual identification of Easton were further corroborated by the investigations of Officer Wands and the detectives. The detectives did not need Michael's statement about a further assault in the man's apartment to establish probable cause and did not rely on it in the affidavit they submitted to Judge Torke. It is true that the detectives acted with haste to arrest Easton once they had completed their interviews with the children, but they had probable cause at that time and also had a legitimate concern for the welfare of other children in the apartment complex. They also were concerned, as Detective Sundberg testified at trial, tnat the people in the apartment complex might find out who Easton was and take retaliatory action against him.

Easton also argues that because the affidavit submitted to Judge Torke by Allen and Sundberg makes no reference to the inconsistencies, and otherwise rephrases some of the children's statements, the detectives are guilty of intentionally misleading the judge. However, because the evidence excluded in no way alter the fact that the evidence included states probable cause, the warrant was valid, whatever the intent of the officers, and Easton suffered no harm. This is not to imply that we find any evidence whatsoever to refute the trial court's finding that there was no intentional misrepresentation or reckless dis-

regard for the truth on the part of Detectives Allen and Sundberg.[5]

We have considered the remainder of appellants' arguments with regard to the arrest of Easton and find them to be without merit. Upon this record the arrest was clearly lawful. This being decided, the remainder of Daniel Easton's arguments and the arguments of his parents Karl and Jacqualine Easton are mooted.[6] In conformity with the preceeding considerations, the decision of the trial court is affirmed.

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[5] It should be noted that no substantial falsehoods were included in the affidavit. Paraphrasing of informant statements or non-verbal responses to questions is perfectly acceptable on such affidavits and, although appellants find mischief in the fact that the affidavit states Michael's age to be 4 when he was in fact only 3 years and 10 months old, we find it more plausible that Detective Allen was merely relying on Officer Wands' report which also stated the age to be 4 although it also accurately gave Michael's date of birth.

[6] Probable cause has always been a good defense to a charge of malicious prosecution, Keeton and Prosser, *Law of Torts*, 876 (5th ed. 1984), and has also been recognized by Colorado as a complete bar to a claim for relief based on a theory of false arrest. *Enright v. Groves*, 560 P.2d 851 (Colo. App. 1977); *White v. Pierson*, 533 P.2d 514 (Colo. App. 1974). Negligence is similarly not actionable given our finding in these circumstances.

APPENDIX B

(p. 1) IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-M-706

DANIEL EASTON,

Plaintiff,

vs.

THE CITY OF BOULDER, COLORADO; DAVID ALLEN, individually and as a police officer, Boulder, Colorado; KEN SUNDBERG, individually and as a police officer, Boulder, Colorado,

Defendants.

REPORTER'S TRANSCRIPT
OF
TRIAL PROCEEDINGS

(Directed Verdict by the Court)

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 8:30 a.m., June 29, 1983, in Courtroom C-202, United States Courthouse, Denver, Colorado.

APPEARANCES

WILLIAMSON & SHAFFER, Attorneys at Law, Boulder, Colorado, by DAVID S. WILLIAMSON and BRUCE SHAFFER, appearing on behalf of the Plaintiff.

VANATTA & HALABY, Attorneys at Law, Denver, Colorado, by THEODORE S. HALABY and BRIAN G.

McCONATY, appearing on behalf of the Defendant, City of Boulder.

CARL MANTHEI, Attorney at Law, Boulder, Colorado, appearing on behalf of the Defendants Allen and Sundberg.

(p. 2) PROCEEDINGS

(WHEREUPON, the following proceedings occurred in open court at 8:30 a.m., June 29, 1983:)

THE COURT: Be seated, please.

(WHEREUPON, oral argument regarding Motions for Directed Verdict were heard by the Court.)

(WHEREUPON, the following Ruling was given by the Court at 9:28 a.m., June 29, 1983:)

THE COURT: Be seated, please. Bring in the jury.

(WHEREUPON, the jury panel entered the courtroom.)

THE COURT: Members of the jury, good morning.

THE JURY PANEL: Good morning.

THE COURT: As I indicated to you, and in explaining why we were going to start a little later this morning, when the Plaintiff's evidence is completed in a trial, then there are certain legal matters to be argued by the lawyers in the case and considered by the Court. And that is what has happened here since 8:30 this morning.

At that time, the Defendants made a motion, a motion called a Motion for a Directed Verdict in their favor. And that is a motion which, under the Rules of Civil Procedure, which govern us in these matters, calls upon the Court, the Judge, to review the law applicable to the case; and with-

out determining the credibility of any witness, and giving every inference from the evidence in favor of the (p. 3) Plaintiffs position, so that there isn't any issue of fact, you see, under our Constitutional system, the jury decides the facts, the Judge determines the law.

So we have to view the facts absolutely in the Plaintiff's favor, including the inferences in the circumstancial evidence, and accepting the truth of all that the witnesses have said and where there is conflict between the witnesses, resolving that conflict in favor of the Plaintiff's position.

Now, then, the question that is presented to a Judge under those circumstances is given those facts, is there a basis for the relief claimed against the Defendants? And in this case, I will tell you there is a continuing uncertainty about the law. As you appreciate, I am sure, as citizens of the United States, there is an inherent conflict in our system, our Constitutional system between individual liberty, the freedom of the individual, and the collective security of our society. We want law and order. We want to be safe in our persons and in our property. And we want the police to protect us. We also want our individual liberties. And this has been a struggle over all of recorded history. Of course, the United States founding fathers, in adopting the Constitution, have, with great foresight, attempted to give us protections in the Fourth Amendment, which protects our right to be secure in our homes and against (p. 4) unreasonable searches and seizures, and the Fifth Amendment which guarantees us due process of law before the forces of Government can deprive us of liberty.

This trial has been concerned directly with those tensions. We have as Defendants two police officers from the

City of Boulder, and we have the City of Boulder itself. We have as a Plaintiff an individual citizen who did have a deprivation of his liberty by being arrested, held some 18 hours or so in jail, and then released on bond under conditions which continued to restrict his liberty. He was required, whether he was in New York or anywhere else, to attend at all sessions of the Court, when called upon, and of course, also to undergo mental strain and trauma of being a person under arrest and charged with a very serious crime, a sex offense against a small boy.

We have separated this trial into the damage questions and have gone forward only with liability. But I can tell you from pre-trial information in the case that there would also be considerable damage testimony presented here; that as a result of all of this, Mr. Easton has had to undergo some therapy and has had his life significantly affected by this arrest.

Now, it's important at the outset to recognize that Daniel Easton is innocent of this charge in the eyes of this Court. Prosecution was not followed up, and it was not (p. 5) a part of this trial to determine whether indeed Daniel Easton committed any offense. The presumption, which is absolutely adhered to in this case, is that Daniel Easton never did the things that he was accused of by his accusors; and that essentially what we are talking about here is that these children identified the wrong man. That's a given in the Court's analysis of this case.

Now, I have reached the decision in the case to direct the verdict in favor of the Defendants; and therefore, the case has not been given to you for decision. But I am, at this time, ruling on the law for the record and I'm addressing these parties, the lawyers, and you all at the

same time because I think you, of course, having been summoned here as our jury, you along with the parties and the lawyers are entitled to know exactly my reasons and my analysis of this case.

Some of what I have to say here, of course, I am going to be using technical language of the law; and you, not being lawyers, may not understand all of it, but I think you ought to share in it.

We have, as a first principal in this case, the procedure that is applicable in the criminal justice system, wherein we are attempting through the system to balance these individual interests that are—or these interests that are in conflict, the individual liberty or the collective (p. 6) security of society by limiting the power of police to make an arrest, to go out and seize a person. And as you have heard at times, in the testimony in this case, that arrest depends upon the showing of probable cause. And probable cause has two aspects of it: One, that a crime has been committed, a certain kind of crime; and another, a felony, and another that the person to be arrested, there is a reasonable belief to be that he or she is the person who committed that offense. Then when that arrest is made, of course, that initiates other aspects of the criminal justice system, which is that the person then is entitled to a preliminary hearing, formal charges filed, representation by counsel, ultimately in the system, trial to a jury, with the Government having the burden of proof of the evidence with charges against the accused, and the duty to find the defendant not guilty, unless the jury is satisfied from the evidence in following the law beyond a reasonable doubt that the defendant is guilty of the offense

charged. So that's a very intricate system which has its initiating point, really, the arrest.

The law provides for an arrest without a warrant under certain limited circumstances, and an arrest with a warrant—and by a "warrant," we are talking about going before a neutral and impartial magistrate, in this case under Colorado Law, a County Judge presenting by affidavit the results of the police investigation, having the person (p. 7) signing the affidavit, who in this case is Defendant Allen, presenting in this fashion on his sworn statement the basis upon which the police contend that probable cause exists. And this warrant was presented to Judge Torke, and he issued the warrant—excuse me, the affidavit was issued to Judge Torke and he issued the warrant, finding probable cause on the basis of the affidavit of Detective Allen.

Now, that protects the police in making the arrest because that, in and of itself, is due process. In this case, the Plaintiff has attempted to set aside that warrant on the basis of the investigation and the affidavit. Here there is a difference in viewpoint between Plaintiff's counsel and me with respect to the law as to what has to be shown to set aside the warrant. My view of the law is that a warrant can be challenged and set aside in a civil action such as this upon a showing that the police officer obtaining the warrant obtained it through intentional misrepresentation; that is to say, knowing that the affidavit was false. That's not been shown in this case. Or it can be set aside upon a showing that the police officer making the affidavit did so with a wreckless disregard for the truth, or did so—well a wreckless disregard is the standard.

Now, that is something different from carelessness or negligence. That is essentially saying "I don't really care whether this is the truth or not. And therefore, I'm (p. 8) acting wrecklessly." It is my view of the evidence that given all of the inferences favorably to the Plaintiff's position that the officer acted wrecklessly, that a jury could not find that from this evidence.

Now, the contention in this case also is that if the wrecklessness is not shown, at least there is negligence. And that the representations made here were negligent ones. What we're talking about with respect to the representations essentially amount to the credibility of the complaining witness, age 3 years and 10 and a half months, young boy, Michael Carpenter; and the corroborating witness, Damion Morris, age 5 years plus. And of course, much of the evidence in the case has been concerned with conflicts in what was told to the police, what they learned through their investigation on the identification issue. And that, of course, is a material issue without question in the affidavit.

The affidavit is based upon a belief that the identification of Daniel Easton by these youngsters is a valid one. And one of the things, of course, that is involved in a question of the credibility of any person, whether it's a youngster or an adult, or anybody at all, involves something that is less than objective, and that is the police officers' in this case observation of the demeanor and manner, the way in which something is said is an important part of determining its truthfulness or its believability.

(p. 9) Now, the standard here, of course, was probable cause, not beyond a reasonable doubt. So the thing here is whether there is a basis, even for saying that there was

negligence in saying in the affidavit that this identification had been made. Now, first of all, it is my position on the law that a negligent misrepresentation does not void a warrant. That more has to be shown, and that at least it has to be wreckless as compared with negligence. In my view, there is no law that vitiates a warrant because the police investigation failed to meet some general standard of adequacy. And the Plaintiff has urged the negligent misrepresentation claim that is in the restatement of the law, and that is set forth in the Plaintiff's Innstruction No. 32 tendered in this case. My holding on the law is that whereas that is the law of Colorado for purposes of a claim for damages by the person to whom the negligent representation was made, it is not the law of Colorado, and it is not the law with respect to the Federal claim in this case that such a negligent misrepresentation would set aside a warrant issued by the County Judge.

The warrant not being set aside in the case, then, it, of course, stands as the process which is due to the Plaintiff, and there is, therefore, no violation of his Constitutional right shown in this case. So there is no basis for recovery under 42 United States Code Section 1983. The (p. 10) warrant also protects the Defendants with respect to the claims under Colorado Law for false arrest and false imprisonment. So the warrant serves as a shield to the individual police officers in this case.

In addition, with respect to the individual officers and considering the Federal claim, 1983, it is clear to me that while the qualified immunity issue is a matter of affirmative defense, and would normally, therefore, be considered at the close of all of the evidence, we have heard the testimony of the Defendants in the case and on the Plaintiff's

evidence alone, the issue of qualified immunity must be resolved in favor of these Defendants.

I have considered carefully the Supreme Court's language in Harlow against Fitzgerald, and of course, the procedural focus in that case was considering the issues on a Motion for Summary Judgment under Rule 56. I believe the same thing would apply here, and as I said in coloquy [sic] with Mr. McConaty, I think the Supreme Court did eliminate the subjective aspect or attempted to eliminate the subjective aspect insofar as we are talking about individual good faith.

In my view under any reasonably prudent person standard, the police officers in this case acted without any awareness that they were under accepted standards of the law violating any Constitutional right of the Plaintiff by obtaining and executing the search warrant, or the arrest (p. 11) warrant.

Now, I have considered also the additional claims in this case that if the warrant is not void, is there still a claim for relief? There isn't any under Federal Law because, there again, we are dealing with the question of invasion of a Constitutional right, and that is the due process and that is the warrant, and the subsequent aspects of the due process provisions in the criminal justice system. So we don't have a Federal claim with the warrant in the case. But we have, as asserted here, a claim under Colorado Law for negligent investigation, and with respect to the City of Boulder, for negligence with respect to training and supervision of the police officers. And it is in connection with this claim that I overruled Defendant's objections and permitted the evidence to come in, particu-

larly from the psychologists, looking at this question of whether the crime that was the subject of the investigation and arrest in this case requires some special training and some special investigative procedures.

I think it is a matter of common sense to recognize that when you are talking about crimes against small children, which by their very nature depend upon the testimony of small children, that there are difficulties. The problem that I have with the Plaintiff's contention here is to define the standard of care. If we say that the standard (p. 12) of care is a reasonably prudent police officer under the same and similar circumstances, then it seems to me that what we are saying is that whenever there is such an offense, and police respond to it, and ultimately everything that happens is going to be subject to the retroactive perspective decision by a jury because all police officers' conduct, then, is going to be subject to jury scrutiny at a later trial. And of course, I am not saying anything against the jury system when I say that that gives the police officers little comfort and little assurance in going forward and responding in such a case because they are saying that a jury could later find them individually liable in damages if the jury disagrees with the reasonableness of the conclusions reached by the police officers who did the investigation.

If we are trying to define some other standard of care, what would it be? There are cases and the Plaintiff's counsels have given them to us, where, of course, there is a duty of care by a police officer and a duty of training with respect to the employer of police officers, the city, when you are talking about such obvious things as the use of firearms, the use of automobiles, the control of prison-

ers, the quelling of riots, and that kind of thing. Here the Plaintiffs are asking us to take that a step beyond and to apply what is evolving knowledge in the discipline of psychology about children and their response to investigation, (p. 13) the investigation of an offense against them, we've heard this testimony in this trial from Dr. Bard, and the special nature of the children that testified to by Dr. Cohen, that we should require that there be some special recognition of this type of offense. And therefore, require the police to use different investigative techniques. That isn't the law today, in my view. And I have reflected at some length because this is a very serious issue, of course. How would we accomplish this? Are we going to say that the least populous and least—or less populous and less financially able community should be held to the same standard as the urban areas, or are we going to say that the police in New York, police in Rangely do things the same way and have the same services available to them, and have psychologists available to them, and the like? And I am not equating Boulder with Rangely, but simply using that as something of a spectrum to identify a problem. We used to have that problem in medical practice and say you had to utilize some sort of community standard. But what it illustrates to me is the difficulty in a court saying, you know, either that, well, it's whatever the jury says it is, which I think simply gives us a paralysis as far as police authority is concerned, or we're going to adopt the views expressed by clinitions and researchers and impose that obligation on the communities, retroactively. I don't think that is the law and I don't think it should be (p. 14) the law because I don't think it's practical.

Now, in addition, it is my view that even if such a standard applies with respect to this case, the chain of causation is broken by the issuance of the warrant. And by the judicial approval of the police's interpretation of their investigation in terms of arriving at the conclusion that it results in probable cause to believe that the person for whom the warrant was issued and who was arrested was the perpetrator of the offense.

The Court is also aware, of course, of what happens when such an arrest is made and is noticed in the press. One of the unfortunate parts of our social order today, I suppose, is that given the rather salacious public taste with respect to what is of interest and what we call "news," people who disseminate what we call news, as a part of their industry, do tend to highlight arrests made for this kind of offense. And it is regrettable and it causes great injury, but that, again, is one of the prices, I guess, we pay for another aspect of our freedom in this system. It's unfortunate that when arrests are made, there is a great deal of publicity. When charges are dismissed, it's seldom seen in the public view. And there is a natural tendency on the part of the public generally to believe that those who are so accused must be guilty. That is a damage, that is the damage that has been done in this case to this young man who is the (p. 15) Plaintiff here and can't be undone. Couldn't even be undone by a damage award in this case.

I know from where I sit in this courtroom and in many trials that there are some things that happen to us in our social order that can't be relieved. And it's my conclusion that that is true in this case. And that the injustice done to Daniel Easton can't be remedied in this Court under the law as it is.

It is, accordingly, my order that the Defendants, all three Defendants' Motion for Directed Verdict is granted, and that judgment will enter in favor of the Defendants, who will also be awarded their costs upon the filing of a Bill of Costs within ten days. I don't recall whether there is a claim for attorney's fees for the Defendants in this case, but if there is, it is denied. It's my view of the case that this is not a frivolous case; that this is one of those cases which comes to us on sort of a cutting edge of the law. I say to the members of the jury that the law is dynamic in that it grows and changes with times, and with changes in knowledge, changes with respect to our views. Ultimately, those changes are made through the legislatures, Congress, or the State Legislature, or by the Supreme Court of the United States. We are in an area of law here where the Supreme Court of the United States is struggling. You may be aware from some of the recent comments in the press (p. 16) about what is called the Exclusionary Rule of the Supreme Court reconsidering the Exclusionary Rule. That's another aspect of our trying to balance individual liberty and collective security. The Exclusionary Rule is one where we are—where a police officer violates a Constitutional right by a search and seizure which is unreasonable; and therefore, prohibited by the Fourth Amendment and what we have done under the Supreme Court's directive is to exclude that kind of evidence, the evidence that results from such a search, from the criminal prosecution in the case. And there have been two schools of thought about that. Another one is well, instead of excluding the evidence, we ought to punish the police officers with a damage remedy. Sue them. We are not talking in this case about search and seizure, but

we are talking about that same philosophical conflict because this is a case in which, of course, there wasn't any criminal prosecution, so you can't use an exclusionary approach, and there is a damage suit against police officers.

We, in our society, put police officers in a very difficult position. They are out there in the street, they have to make quick judgments, and they have to appear these days in Court if, you know, one of the possibilities in a situation such as this is that if they don't arrest somebody and someone else is the victim of a crime, that person sues (p. 17) them saying there should have been—you should have made an arrest, there was probable cause, and you didn't so now you have violated my rights by not doing your job.

Members of the jury, I appreciate your service in this case. The result here is one in which I have ruled instead of you, but you have been necessary. We have to go into the trial and determine what the evidence is before I can rule. And I recognize you might not agree with my decision in the case. But I suppose if we haven't accomplished anything else from your standpoint, you have discharged your duty and you are now going to be discharged, of course, about the end of your term of service anyway on the jury, but perhaps this has been of some benefit to you in coming face to face with some of the kinds of conflicts and the issues and problems that are very much a part of our struggle to achieve justice in this country of ours. And you may, I hope, go forward from this trial with some greater understanding of about some of these problems.

Again, we appreciate your service in this case, and you are now excused.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM—October 28, 1985

Before Honorable James K. Logan, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Luther Bohanon*

DANIEL EASTON, KARL EASTON and JACQUALINE EASTON,

Plaintiffs-Appellants,

v.

THE CITY OF BOULDER, COLORADO; DAVID ALLEN, individually and as police officer, Boulder, Colorado; KEN SUNDBERG, individually and as police officer, Boulder, Colorado,

Defendants-Appellees.

J U D G M E N T

No. 83-1970

(D.C. # 82-M-706)

This cause came on to be heard on the record on appeal from the United States District Court for the — District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
Clerk

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* District Judge of the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

APPENDIX D

JANUARY TERM—February 14, 1986

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1970

DANIEL EASTON, KARL EASTON and JACQUALINE EASTON,

Plaintiffs/Appellants,

vs.

THE CITY OR BOULDER, COLORADO, DAVID ALLEN, individually and as police officer, Boulder, Colorado, KEN SUNDBERG, individually and as police officer, Boulder, Colorado,

Defendants/Appellees.

ORDER DENYING PETITION FOR REHEARING

Before HOLLOWAY, McWILLIAMS, BARRETT, McKAY, LOGAN, SEYMOUR, MOORE, Circuit Judges, and BOHANON, District Judge*

In their petition for rehearing, appellants argue that this court in its October 28, 1985, opinion in this matter, *Easton v. City of Boulder, Colo.*, 776 F.2d 1441, improperly based its decision upon the existence of probable cause for the arrest of the appellant Daniel Easton when the issue of probable cause had not been argued either before the trial court or on appeal. They cite *Singleton v. Wullf*,

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* Honorable Luther Bohanon, Senior United States District Judge for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

428 U.S. 106 (1976) and *Wilson v. St. Louis-San Francisco Railway Co.*, 673 F.2d 1152 (10th Cir. 1982) as supporting their position.

In *Singleton*, however, the Court said:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . .

428 U.S. at 121. Similarly, our opinion in *Wilson* in no way amounts to a blanket prohibition of deciding appellate cases on legal grounds not considered by the trial court and we expressly countenanced such decisions when "the facts are sufficiently clear to permit our determination." 673 F.2d at 1155. It is, of course, universally accepted that a trial court's decision may be affirmed if it reached a correct result even though the trial court based its judgment on an improper ground or gave a wrong reason. *Robert-Gay Energy Enterprises, Inc. v. State Corp. Com'n. of Kansas*, 753 F.2d 857 (10th Cir. 1985); *Office and Professional Employees Intern. Union, Local 2 v. Washington Metropolitan Area Transit Authority*, 233 U.S. App. D.C. 1, 724 F.2d 133 (1983); *Roy v. City of Augusta, Maine*, 712 F.2d 1517 (1st Cir. 1983); *Zdnok v. Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944 (2nd Cir.), *cert. denied* 377 U.S. 934 (1964); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141 (3rd Cir. 1983); *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978); *Howard v. Gonzales*, 658 F.2d 352 (5th Cir. 1981); *Olympic Fastening Systems, Inc. v. Textron Inc.*, 504 F.2d 609 (6th Cir. 1974), *cert. denied* 420

U.S. 1004 (1975); *Streit v. Fireside Chrysler-Plymouth, Inc.*, 697 F.2d 193 (7th Cir. 1983); *Johnson v. First Nat. Bank of Montevideo*, 719 F.2d 270 (8th Cir. 1983), *cert. denied* 465 U.S. 1012 (1984); *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984); *Collins v. Seaboard Coastline R. Co.*, 681 F.2d 1333 (11th Cir. 1982). It would be folly to endorse the view that we may so decide appeals without regard to the correctness of the trial court's legal reasoning but still insist that we must always have the benefit of such reasoning before reaching a decision. Such pointless formality would result in a truly unjustifiable waste of judicial resources in many cases. The more sensible understanding is that "[a]n appellate court is not called upon to decide whether the trial court reached the correct conclusion of law, but whether it reached a permissible conclusion in light of the evidence." *Volis v. Puritan Life Ins. Co.*, 548 F.2d 895, 901 (10th Cir. 1977); *cf. Yale v. National Indemnity Co.*, 602 F.2d 642, 645 (4th Cir. 1979) ("we review judgments, not reasons"). The trial court's legal reasoning is largely irrelevant to our task and, provided the evidentiary record is sufficiently complete, we may decide a case on any appropriate basis appearing on the record whether or not that basis was first presented to and considered by the trial court.

It is, in any event, at best misleading to assert in this case either that the question of the existence *vel non* of probable cause was not presented to the trial court or that it was not argued on appeal. A reading of the Pre-trial Order filed in the trial court on April 28, 1983, reveals a detailed presentation of the appellants' view of the law governing probable cause determinations. Likewise, the Eastons' appellate brief contains the following argument at pages 18 and 19:

> The issue as to whether or not the individual Defendants violated the Fourth Amendment rights of Plaintiff Daniel Easton turns on whether probable cause existed at that time the arrest warrant [sic]. The existence of probable cause must be determined by all facts and information within the individual Defendants [sic] knowledge at the time they requested the warrant, not solely the facts and information which was relayed to the Judge who issued the warrant . . . Further, the mere issuance of a warrant for arrest is not prima facie evidence of the existence of probable cause for its issuance."

Our opinion in this case merely agrees with this argument advanced by appellants themselves, and we decided the case on precisely the basis they advocated in the language just quoted. The assertions in their Petition for Rehearing that they "did not have the opportunity to address, brief or argue the alternative grounds" (i.e. the existence of probable cause) and that "[T]he issue was not even raised until the court announced its decision" are patent falsehoods and, if made in good faith, must be the result of an exceedingly poor memory.

The appellants further argued in their reply brief that

> *All* of the facts and information of which Defendants Allen and Sundberg were aware prior to Daniel Easton's arrest are encompassed in Officer Wands' report (Ex. 2), the taped interviews of Michael . . . and Damion . . . (Ex. 3 and 4), the "identification" of Daniel Easton by Michael . . . immediately following his taped interview (S. Vol. I, p. 46, l. 16—p. 48, l. 2), and the fact that Daniel Easton lived in apartment 218. Considering *all* facts known to Allen and Sundberg, they did not have probable cause to arrest Daniel Easton without a warrant.

Reply Brief at 7 (emphasis in original). This clearly amounts to an assertion that all of the evidence pertinent

to a determination of whether the officers had probable cause to arrest Easton is contained in the record on appeal. While it is clear that our assessment of this evidence does not agree with appellants' assessment, they cannot be heard to say that they did not argue the matter on appeal before we issued our opinion.

Turning now to the substantive issue of the sufficiency of the evidence which appellants *again* argue in their Petition for Rehearing, we find their petition to be essentially a rehashing of points already thoroughly discussed in our prior opinion, combined with a very strained misconstrual of our findings.

Contrary to appellants' assertion, we did not hold that "the information obtained from a child-witness to a crime should be deemed to be more reliable because the child is the only witness." Petition for Rehearing at 17. To the contrary, we said no more on this point than that such information should not be discounted from the outset, that is, absent a determination, based on the totality of the circumstances, that the information is unreliable. *Cf. Illinois v. Gates*, 462 U.S. 213, 238 (1983).

We also did not hold that "it is proper to consider only inculpatory, to exclusion of exculpatory evidence, when determining the existence of probable cause." Petition for Rehearing at 17. What we *did* say, in commenting on Easton's charge that the police officers were guilty of intentionally misleading the judge, was that "because the evidence excluded in no way alters the fact that the evidence included states probable cause, the warrant was valid, whatever the intent of the officers, *and Easton suffered no harm.*" 776 F.2d at 1451 (emphasis added). In other words, we held that Easton suffered no prejudice to

his right not to be arrested without probable cause even if the officers attempted to mislead the judge (and we agreed with the trial court's findings that they did not so attempt). Regardless of the officer's intent, the judge was not in fact mislead,[1] there *was* probable cause to arrest Daniel Easton, and the arrest upon the valid and duly issued warrant was entirely legal.

Lastly, appellants have argued in their petition that our opinion in this case is inconsistent with this court's ruling in *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984). On October 7, 1985, the United States Supreme Court granted certiorari in that case, vacated our judgment and remanded the case to us for reconsideration in light of the Court's opinion in *City of Oklahoma City v.*

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[1] Appellants continue to cite the fact that during the trial below, the Honorable David Torke, the judge who issued the warrant in this case, upon being presented with a hypothetical summarizing certain facts in this case, testified that he would not have issued the warrant upon those facts. ROA Vol. VI pp. 666-67. Appellants' recollection of the record is selective, however. The transcript of Judge Torke's testimony also contains the following exchange which occurred after the comments appellants reference:

> Q. Knowing everything that you now know, which is Exhibits 2, 3 and 4, Exhibit 6 and 7, and all the statements that have been made to you, if Detective Allen brings you Exhibit 6 [the affidavit], and Exhibit 7 [the warrant] again, would you issue this warrant?
>
> A. [Judge Torke] Yes, I would.
>
> Q. And why is that?
>
> A. Because it states probable cause to believe that a crime has been committed, and that Daniel Easton had committed it, . . .

ROA Vol. VI at 73

Tuttle, 471 U.S. —, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Proceedings in the case on remand are not yet concluded. Despite the fact that by virtue of the Supreme Court's order, our November, 1984, opinion in *Lusby* is now without precedential value, the Court's citation of *Tuttle* draws into question elements of *Lusby* not directly tied to the portions of our *Lusby* opinion cited by appellants as being inconsistent with our opinion in the instant case. It, therefore, behooves us to explain in more detail why appellants' reliance on *Lusby* is, in any event, misplaced.

Appellants directly refer to the portion of our *Lusby* opinion where we held that a defendant in that case arising under 42 U.S.C. § 1983 forfeited whatever right he had to an instruction on qualified immunity

> by acting unreasonably when he investigated the alleged shoplifting. . . . The law evaluates such conduct primarily by objective standards, determining whether a reasonable person would have known he was violating a constitutional or statutory right. . . . In this case there is evidence that [the defendant] did not check with the clerk operating the checkout line to see if [the plaintiff] paid for the sunglasses. Moreover, [the defendant] refused to let [the plaintiff] get the cashier's attention at a time when her memory would still have been fresh.

749 F.2d at 1432. We first note that the matter under discussion in the passage cited by appellants was a question of qualified immunity, an affirmative *defense* which the Supreme Court has specifically defined so as to allow the defense to be resolved as a matter of law in most cases *prior* to trial. *Harlow v. Fitzgerald,* 457 U.S. 800, 815-819 (1982). We, therefore, were not directly addressing a substantive fact issue bearing on the legality of the arrests

involved in *Lusby*. It is further clear from the facts mentioned in the language quoted above and elsewhere in *Lusby* that the factual circumstances of the arrest in that case were vastly different from those surrounding the arrest of Daniel Easton in the present matter.

In *Lusby* there was essentially ***no*** investigation by the arresting officer other than a brief questioning of the suspect to determine whether he had a receipt for the sunglasses he allegedly had shoplifted. The only evidence the officer had for making the arrest was the assistant store manager's report that he saw the suspect pass through the checkout line carrying the sunglasses but not paying for them. The officer made no attempt to check the suspect's explanation by questioning the readily available cashier who earlier sold the glasses to the suspect and indeed the officer used physical force to prevent the suspect from getting the cashier's attention himself. This last conduct was obviously unreasonable.

In the present case, on the other hand, the police conducted an extensive investigation which involved repeated questioning of the primary witnesses over a period of several days and independent corroboration of their statements. There is also little similarity between the *Lusby* defendant's refusal to question or allow questioning of the cashier, who was immediately at hand and possessed a fresh memory of the central fact, and the refusal of the arresting officers in this case to go to a restaurant to seek out a waitress who Easton, after he had been arrested pursuant to a lawfully issued warrant supported by probable cause, claimed could "possibly" provide him with an alibi for the afternoon eight days before when the crime he was charged with occurred. ROA Vol. IV p. 45. If we were to

require police officers to investigate all such possible alibis upon apprehending a suspect, they would spend too much of their time on wild goose chases best left to defense counsel and would have little left for their proper tasks of law enforcement.

We have examined all of appellants' arguments and find them individually and collectively to be lacking in merit. The appellants' Petition for Rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Clerk

APPENDIX E

(Excerpt from pages 17-19 of Petitioners' Initial brief before the Court of Appeals)

II. THE EXISTENCE OF A VALID ARREST WARRANT DOES NOT, IN AND OF ITSELF, CONSTITUTE A COMPLETE DEFENSE TO A 42 U.S.C. § 1983 CLAIM FOR UNLAWFUL ARREST.

Plaintiff Daniel Easton asserted two claims for violation of his civil rights. The first claim was asserted against the individual Defendants as a result of their conduct in obtaining the arrest warrant and in subsequently arresting Daniel Easton. The Ninth Claim for Relief asserts a denial of civil rights against the Defendant City of Boulder as a result of the failure of the City of Boulder to adequately train and supervise its police personnel in conjunction with procedures and investigations necessary to obtain arrest warrants. The § 1983 claims of Daniel Easton focus both upon the arrest itself *and* upon the process utilized by the Defendants in obtaining the arrest warrant.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, (p. 18) regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed. 2d 420, 101 S.Ct. 1908 (1981), the Supreme Court addressed the

essential elements necessary to a 42 U.S.C. § 1983 action. The Supreme Court stated:

> [I]n any § 1983 action the initial inquiry must focus on whether two essential elements of a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. (at 535)

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, ...

"By virtue of its 'incorporation' into the Fourteenth Amendment, the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause." *Baker v. McCollan,* 443 U.S. 137, 142, 99 S.Ct. 2689, 61 L.Ed.2d 433, 140 (sic) (1979).

The issue as to whether or not the individual Defendants violated the Fourth Amendment rights of Plaintiff Daniel Easton turns on whether probable cause existed at that time the arrest warrant. The existence of probable cause must be determined by all facts and information within the individual Defendants knowledge at the time they requested the warrant, not solely the facts and information which was relayed to the Judge who issued the warrant. *People v. King,* 189 Colo. 454, 541 P.2d 901 (1975). (p. 19) Further, the mere issuance of a warrant for arrest is not prima facie evidence of the existence of probable cause for its issuance. *Gibson v. Peyton,* 262 F. Supp. 574 (Va, 1966).

Garris v. Rowland, 678 F.2d 1264 (5th Cir., 1982) involved a factual situation somewhat analogous to the case at bar. The plaintiff in that case initiated a 42 U.S.C. 1983 case as a result of his arrest by the defendant police officers. The defendant police officers, acting upon third hand hearsay and an abbreviated investigation of a suspected crime, drafted an arrest warrant affidavit for the arrest of the plaintiff. The County Magistrate, acting upon the defendant police officer's affidavit, issued the warrant. The defendant police officers who obtained the arrest warrant then executed the warrant. At trial the jury found that at the time the plaintiff was arrested by the defendant officers probable cause did not exist.

On appeal the Court *rejected* the defendant's argument that the District Court errored when is submitted to the jury the issue of whether probable cause existed upon which to base the plaintiff's arrest without first finding that the arrest warrant itself was invalid. The Court of Appeals held that the fact that the plaintiff was arrested without probable cause "made out the Fourth Amendment violation providing the basis for the § 1983 action." (Id. at 1271).

The Court of Appeals in *Garris, supra* went on to hold that the validity of the warrant *may* have an affect upon the qualified immunity affirmative defense of the individual officers. However, in the case at bar, the question of the applicability of the qualified immunity defenses did not come into issue insomuch as the trial court dismissed the case prior to the presentation (p. 20). . . .